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82 - 1834

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH SCALISE and ARTHUR RACHEL,

Petitioners,

vs.

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, and SPECIAL ATTORNEY FOR THE DEPARTMENT OF JUSTICE, NORTHERN DISTRICT OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SAM ADAM
EDWARD M. GENSON*
JEFFREY B. STEINBACK
134 North LaSalle Street #300
Chicago, Illinois 60602
(312) 726-9015
Attorneys for Petitioners

* Counsel of Record.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit, which determined that assertions of violations of citizens' Fourth, Fifth, and Sixth Amendment rights by United States government agents on United States soil are not cognizable issues in extradition proceedings and subsequent habeas corpus review, is unconstitutionally narrow, which is an important issue not previously settled by this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioners, Joseph Scalise and Arthur Rachel, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A, attached hereto. The order of the United States Court of

Appeals denying a petition for rehearing *en banc* appears in Appendix B, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 8, 1982. Petitioners filed a petition for rehearing with *en banc* suggestion, which was denied in an order entered on March 10, 1983. This petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 6, Clause 2, of the United States Constitution and the Fourth, Fifth and Sixth Amendments to the United States Constitution are herein involved. Article 6, Clause 2, of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or laws of any state to the contrary notwithstanding."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . Nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On September 11, 1980, Petitioners were arrested at O'Hare Airport, Chicago, Illinois, by FBI agents. On October 27, 1980, the United States filed a complaint for Petitioners' extradition after a formal diplomatic request by the United Kingdom. Following hearings, the Magistrate certified Petitioner Scalise's extradition to the Secretary of State. Petitioner Rachel's extradition was certified subsequently after a hearing to ascertain his competence to understand the nature of the charges in the extradition proceedings and to cooperate with his counsel. Subsequently Petitioners filed petitions for writ of habeas corpus challenging the violations of their constitutional rights stemming from their seizures at O'Hare Airport, subsequent interrogation and detention without counsel, searches and seizures of their persons and property, and the unlawful planting of informants in their jailhouse. The United States District Court denied both writs of habeas corpus, and the denial was upheld by the United States Court of Appeals for the Seventh Circuit on December 8, 1982. Petitioner filed a petition for rehearing with *en banc* suggestion, which was denied on March 10, 1983.

REASONS FOR GRANTING THE WRIT

The decision for the United States Court of Appeals for the Seventh Circuit, which holds that constitutional questions are not cognizable in extradition proceedings and subsequent habeas corpus review, decides an important question of federal law which has not been settled by this Court. The decision of the Court of Appeals for the Seventh Circuit rests on an analysis of the case *In Re Matter of Assarsson,* 635 F.2d 1237 (7 Cir., 1980). *In Re Matter of Assarsson,* however, did not address the specific issue presented in this case of whether constitutional violations by United States agents on United States soil is a properly cognizable issue in extradition proceedings. The reliance of the Court of Appeals for the Seventh Circuit on *In Re Matter of Assarsson* was improper in that it misconstrued that decision to apply in a myriad of situations which were not presented in the case.

The issue squarely presented to this court is whether the courts of the United States are empowered to consider asserted violations of the United States Constitution, by United States law enforcement agents, upon United States citizens held in custody of the United States Marshal. Petitioners, who were arrested on United States soil by United States Federal Bureau of Investigation agents and are being held pending extradition by the United States Marshal's office, asserted in the extradition proceedings and subsequent habeas corpus review that several serious violations of their constitutional rights occurred at the time of arrest and during the course of custody. Petitioners were subject to unlawful pretextual arrests, they were subject to unlawful searches and seizures, they were subject to unlawful custodial interrogation and improper de-

tention without counsel, and they were subject to unlawful planting of more than one informant in their jailhouse[1] in violation of their Fourth, Fifth and Sixth Amendment rights. Further, to the extent that an extradition treaty precludes a United States court's inquiry into constitutional violations, the treaty violates the constitution.

Article 6 of the United States Constitution, the Supremacy Clause, states:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; . . ."

In *Reid* v. *Covert*, 354 U.S. 1, 16, 1 L.Ed.2d 1148, 1163, 77 S.Ct. 1222 (1957), this Court unequivocally held that treaties are subject to and must comply with the provisions of the Constitution. This Court stated:

> "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Id.*, 354 U.S. at 17, 1 L.Ed.2d at 1163.

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[1] From the moment Petitioners fortuitously learned of the placing of several informants in their jailhouse and throughout the proceedings on appeal, Petitioners have contended that their Sixth Amendment right to counsel has been wilfully violated by the planting of such jailhouse informants at the Metropolitan Correctional Center. Petitioners have been able to conclusively demonstrate the plantings of such jailhouse informants pursuant to depositions in which two informants admitted such planting. Petitioners have the grand jury testimony of one Michael Richards and one John Forbes, in which they admitted being jailhouse plants. The government has never denied the existence of this odious situation, and, indeed, cannot. The United States Court of Appeals affirmance has the direct effect of condoning and encouraging this wholly illegal conduct.

This Court urged vigilance in protecting against even slight encroachments on constitutionally guaranteed rights, quoting from *Boyd* v. *United States*, 116 U.S. 616, 635, 29 L.Ed. 746, 750, 6 S.Ct. 524:

> "It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachment thereon." *Reid* v. *Covert*, 354 U.S. at 40, 1 L.Ed.2d at 1176.

Vigilance in protecting against encroachment on citizens' constitutionally guaranteed rights necessitates that courts use their supervisory powers. As the Court noted in *United States* v. *Cortina*, 630 F.2d 1207, 1214 (7 Cir., 1980):

> "There should be no compromise with the principle that agents of the United States cannot be permitted to manipulate the judicial system to circumvent constitutional requirements."

The failure of courts to address constitutional deprivations in extradition proceedings, by narrowing the scope of those proceedings, unquestionably results in the manipulation of the judicial system and in the condonation of continuing constitutional violations by government agents. The foreclosure of review by United States courts in extradition proceedings of constitutional violations perpetrated by United States government agents results in the acceptance of an international "silver platter" doctrine.

The Court in *Elkins* v. *United States*, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960), addressed concerns of comity which allowed the silver platter doctrine to exist vis-a-vis state and federal government agents, and which is apparently allowed to exist between U.S. and foreign

countries. The Court, in applying the Fourth Amendment Exclusionary Rule to state court proceedings, stated:

> "To the victim it matters not whether this constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution." *Id.*, 364 U.S. at 215, 4 L.Ed.2d at 1676.

Under principles of comity, United States courts cannot dictate procedures in the courts of foreign nations. As a result, United States courts cannot order foreign courts to quash arrests illegally made by United States agents or suppress information or evidence illegally obtained by United States agents. However, United States Courts have an obligation, under the court's supervisory powers, to insure that individuals arrested illegally by United States government agents are not extradited pursuant to such illegal arrests and that United States government agents are not allowed to transmit illegally obtained information or evidence to such foreign countries. See, *Rea* v. *United States*, 350 U.S. 214, 100 L.Ed.2d 233, 79 S.Ct. 292 (1976); and *McNabb* v. *United States*, 318 U.S. 332, 87 L.Ed. 819 (1973). In *In the Matter of Assarsson, supra*, the courts stated that courts do not have power to oversee the criminal justice system of other countries, however courts do have power to guarantee that all persons on United States soil receive due process under United States laws. *Id.*, 635 F.2d at 1244.

The failure of United States courts to exercise their well-defined supervisory powers to protect against encroachment on citizens' constitutional rights, simply be-

cause the question is presented in an extradition proceeding, results in an implicit finding in the guise of comity that extradition treaties are outside the scope of the Constitution. This Court noted in *Reid* v. *Covert, supra*:

> "The concept of the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government. If our foreign commitments become of such nature that the government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the methods which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there." *Id.*, 354 U.S. at 14, 1 L.Ed.2d at 1162.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that this Honorable Court issue its writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Edward M. Genson
Sam Adam
Jeffrey B. Steinback
134 North LaSalle #300
Chicago, Illinois 60602
(312) 726-9015
Attorneys for Petitioners.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 27, 1982)
December 8, 1982.

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. John Minor Wisdom, Senior Circuit Judge*

JOSEPH SCALISE and ARTHUR RACHEL,
Petitioners-Appellants,

No. 81-2709 vs.

ATTORNEY GENERAL OF THE
UNITED STATES, United States Marshal
for the Northern District of Illinois and
Special Attorney for the Dept. of Justice
for the Northern District of Illinois,
Respondents-Appellees

In the Matter Of: 81 C 1139
The Extradition of Arthur Rachel. 81 C 3003
Appeal Of: Arthur Rachel
No. 82-1649
Federal prisoners' habeas corpus petitions.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Prentice H. Marshall, *Judge.*

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* Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit sitting by designation.

ORDER

Joseph Scalise and Arthur Rachel appeal from the district court's dismissal of their writs of habeas corpus challenging their incarceration pursuant to a warrant commanding that they be held for extradition to England for robbing a London jewelry store. Scalise and Rachel contend that there were no reasonable grounds to believe them guilty of the charge and that their constitutional rights have been violated by their detention. They also contend that the district court should have dismissed their extradition proceedings because their constitutional rights were violated during their arrest and incarceration. We affirm the denial of their writs of habeas corpus and hold that Scalise and Rachel are extraditable.

I.

On September 11, 1980, two armed men robbed Graff Jewelers in London, England, and fled with jewelry valued at 1.4 million British pounds sterling. A witness followed the two men, saw them get into a green Fiat car, and noted the license plate number. Another witness saw two men going in the wrong direction on a one way street in a green Fiat near Victoria Station, where they parked it. A cab driver picked up two men near Victoria Station and drove them first to a hotel and then to Heathrow Airport. The smaller man had a deformed hand.

In October 1980, the United Kingdom charged Scalise and Rachel for the Graff robbery on two counts of robbery and possession of a firearm or imitation firearm with intent to commit an indictable offense. These counts were based on evidence which identified a green Fiat rented by Scalise as the getaway car in the Graff robbery and which placed them in the area where the crime occurred. On the day of the robbery, Scalise and Rachel left London for Chi-

cago. FBI agents arrested them upon their arrival at O'Hare Airport.

On October 27, 1980, the United States filed a complaint for the appellants' extradition after a formal diplomatic request by the United Kingdom to do so. Following hearings, the magistrate certified Scalise's extradition to the Secretary of State.[1] The magistrate certified Rachel's extradition after a hearing in which it was found that Rachel was competent to understand the nature of the charges in an extradition proceeding and to cooperate with his counsel.[2] Scalise and Rachel petitioned for writs

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[1] Both Scalise and Rachel argued to the magistrate that the extradition documents should not be admitted because they did not comply with the Extradition Treaty between the United States of America and the Government of the United Kingdom, 28 U.S.T. 229, T.I.A.S. No. 8468 (1972); that certain exhibits in the extradition documents should be excluded from consideration in the extradition hearing because they were the fruits of either an unlawful arrest, search or custodial interrogation; and that transmission of these fruits of illegal activity to British authorities had so tainted all future proceedings that quashing the extradition complaint is required. The magistrate rejected these arguments. Scalise and Rachel also argued that they should not be extradited because there was no reasonable ground to believe them guilty of the offense. The magistrate concluded that the affidavits of witnesses and documentary evidence gave rise to the reasonable inference that Scalise and Rachel committed the crime charged.

[2] During the extradition proceedings, Rachel's attorney asserted that his client neither understood the nature of the proceedings nor had the present ability to consult with his attorneys because of mental disease. While the extradition hearing went forward against Scalise, Rachel was examined by his own and court appointed psychiatrists. In April 1981, the magistrate conducted a competency hearing and found that Rachel possessed the present mental ability and competency to understand the extradition proceedings and to cooperate with his counsel. The magistrate also found that Rachel consciously exaggerated his symptoms in an attempt to avoid extradition.

of habeas corpus alleging that a number of their constitutional rights had been violated and that they were not extraditable under the terms of the extradition treaty with Great Britain. The district court denied the petitions.

On appeal, Scalise and Rachel contend that they should not be extradited, because there was no reasonable ground to believe them guilty of the Graff robbery. They also raise various constitutional objections to the dismissal of their writ. They assert that the denial of their writs without a hearing on the constitutional issues that they raised deprived them of due process. If the extradition treaty allows this result, they assert that it is unconstitutional. They also contend that the extradition proceeding should have been dismissed because their constitutional rights were violated by an unlawful pretextual arrest,[3] an unlawful custodial interrogation and improper detention without counsel, unlawful searches and seizures, and an unlawful planting of an informant in their jail house. Finally, Rachel argues that it is fundamentally unfair to extradite him because there was substantial evidence that he is a paranoid schizophrenic who was unable to understand the proceedings against him.

II.

Extradition rulings are not directly appealable; review is available by way of the writ of habeas corpus. *Collins* v. *Miller*, 252 U.S. 364, 369, 40 S.Ct. 347, 64 L.Ed. 616, 618. Review is also very limited:

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[3] Scalise and Rachel contend that their arrest was illegal because no arrest warrant was issued. They claim that there was no probable cause for their arrest because the only information available to the FBI was received in a phone call from an alleged Scotland Yard officer who stated that an unnamed witness observed the license number of the getaway car and that Rachel had rented the car with this license number.

> [The habeas corpus] writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate has jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

In re Matter of Assarsson, 635 F.2d 1237, 1240 (7 Cir. 1980) (quoting Fernandez v. Phillips, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970, 972-73), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 325 (1981). *See Garcia-Guillern* v. *United States*, 450 F.2d 1189, 1191-1193 (5 Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972). This limited scope of review is based on respect for the sovereignty of other nations and on the recognition that a decision to extradite does not constitute a final judgment on the guilt or innocence of the accused. *Assarsson*, 635 F.2d at 1244-46. Scalise and Rachel do not contest jurisdiction or whether the offense charged is within the treaty. We must decide, therefore, if there is any evidence warranting the finding that reasonable grounds exist to believe Scalise and Rachel guilty of the Graff robbery.

III.

Scalise and Rachel contend that the magistrate erred in finding a reasonable ground to believe them guilty. They argue that the case against them is circumstantial and that no one has identified them as the robbers. They also argue that the descriptions of the perpetrators were vague and inconsistent and do not fit their descriptions. These arguments are unpersuasive. There was substantial evi-

dence that Scalise and Rachel committed the crime: their concession that they were in London at the time of the robbery; their immediate departure after the robbery; their use of their own names and identification to rent a green Fiat Mirafiori; the chain of eyewitness observations connecting the renters of the green Fiat Mirafiori with the robbers; and the numerous witnesses who observed a withered or deformed left hand on one of the suspects, which matches the appearance of the withered left hand of Scalise. We hold that this evidence warrants "the finding that there was reasonable ground to believe the accused guilty." *Assarsson*, 635 F.2d at 1240.

IV.

Scalise and Rachel raise various constitutional challenges to the extradition procedure and their order of extradition. These claims are not reviewable under *Assarsson*. We do not condone the alleged constitutional violations in this case, but we hold that Scalise and Rachel have received all the process they are due in the determination of whether they should be extradited. The extradition process is not meant to determine guilt or innocence, but only to determine whether an allegation by a foreign government that an American citizen has committed a crime falls within the extradition treaty and, supported by sufficient evidence, warrants extradition of the accused American citizen. The ultimate dispensation of justice is left to the foreign country.

V.

The district court had jurisdiction, the crimes charged are within the treaty, and there is reasonable grounds to believe Scalise and Rachel guilty. This ends our inquiry under *Assarsson*. We AFFIRM the decision of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1983.

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. John Minor Wisdom, Senior Circuit Judge*

JOSEPH SCALISE and ARTHUR RACHEL,

Petitioners-Appellants,

Nos. 81-2709 and 82-1649 vs.

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, and SPECIAL ATTORNEY FOR THE DEPARTMENT OF JUSTICE, NORTHERN DISTRICT OF ILLINOIS,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
81 C 1139, 81 C 3003
Prentice H. Marshall, *Judge*.

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* The Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellants Scalise and Rachel, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.